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No. 96-1769

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

OHIO ADULT PAROLE AUTHORITY, et al., *Petitioner*,

v.

EUGENE WOODARD, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ARIZONA, ARKANSAS, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW JERSEY, NEW YORK, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VIRGINIA, WASHINGTON AND WYOMING IN SUPPORT OF PETITIONER

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. WHETHER STATE CLEMENCY PROCEDURES MAY BE REVIEWED UNDER THE DUE PROCESS LIMITATIONS ON A STATE'S OVERALL SCHEME OF ADJUDICATION OF CRIMES AND PUNISHMENT ESTABLISHED BY *EVITTS V. LUCEY*, 469 U.S. 387 (1985), OR WHETHER *CONNECTICUT BOARD OF PARDONS V. DUMSCHAT*, 452 U.S. 458 (1981) CONTAINS THE SOLE DUE PROCESS LIMITATIONS ON THESE PURELY EXECUTIVE PROCEDURES.

2. WHETHER INMATE INTERVIEWS, HELD VOLUNTARILY AT THE REQUEST OF THE INMATE AS PART OF A STATE CLEMENCY PROCEDURE, IMPOSE AN UNCONSTITUTIONAL CONDITION ON THE INMATE'S FIFTH AND FOURTEENTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION.

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 96-1769

OHIO ADULT PAROLE AUTHORITY, et al., *Petitioner*,

v.

EUGENE WOODARD, *Respondent*.

INTEREST OF AMICI CURIAE STATES

Amici curiae are the legal representatives of their states' executives and of the People in their states' post conviction litigation. All states have established a non-judicial clemency power in their executive branches. The opinion in *Woodard v. Ohio Adult Parole Authority*, 107 F.3d 1178 (6th Cir. 1997) [hereinafter *Woodard*] threatens to destabilize the jurisprudence underlying the states' criminal justice schemes, including the clemency power.

Amici have relied upon this Court's assurance that the executive clemency power is not an appropriate subject for judicial review. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 460 (1981) [hereinafter *Dumschat*]. This Court also advised the states that once their capital punishment statutes met Eighth Amendment requirements that the states enjoy "their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990). Amici vested unfettered clemency discretion in their executives on the assumption that executive decisions

would be final and not subject to additional judicial review. *Woodard's* historically unsupported holding that an undefined, barely perceptible due process protection applies to clemency opens the door to intrusive judicial scrutiny of every states' clemency decisions.

Amici states have taken the cue from the Constitution by vesting the clemency power in their executive as an alternative to the procedural rigidity of the judicial branch. The clemency process allows for a non-judicial review of individual cases. The prospect of an additional level of intrusive litigation and discovery relating to the clemency process itself will inevitably inhibit the flexibility of this power, dilute the sense of personal responsibility in the executive necessary to the meaningful consideration of clemency cases, and affect clemency's availability.[1]

SUMMARY OF ARGUMENT

Our nation's history, traditions, and practices do not establish that a claimant for state executive clemency is entitled to any protections under the Due Process Clause of the Fourteenth Amendment. From "time immemorial" the clemency power has been vested exclusively within the executive. It is an unfettered,

1. This Court's wisdom in granting review has been vindicated by recent Sixth, Eighth and Ninth Circuit decisions in *In re Sapp*, __ F.3d __, 1997 W.L. 357822 (6th Cir. 1997), *Perry v. Brownlee*, ___ F.3d ___ 1997 W.L. 451160 (8th Cir. 1997) and *Woratzeck v. Arizona Board of Executive Clemency*, 117 F.3d 400 (9th Cir. 1997). In these cases, capital claimants mounted last-minute attacks on the states' clemency procedures. These maneuvers confirm amici's concern that *Woodard* would lead to burdensome discovery requests, increased litigation and potential delay in post conviction proceedings. The concerns are heightened, of course, in capital cases. *Lindh v. Murphy*, ___ U.S. ___, 117 S. Ct. 2059, 2070 (1997) (Rehnquist, C.J. dis.).

discretionary power that acts independently of the criminal adjudication system.

The states' executive clemency power is substantially modelled on the Pardoning Power in the United States Constitution and the historic royal prerogative in England. These sources established that an exclusive, flexible clemency power should be vested in the executive branch as a counterpoint to the procedural rigidity inherent in the judicial branch.

Judicial review of state executive clemency processes adds an unnecessary layer of litigation to the already protracted process of reviewing criminal convictions. It involves the federal judicial branch in the troubling and serious business of reviewing the variable procedures of totally separate sovereignties, the state executive branches. Such review is paradoxical since clemency is meant as a check on the judicial branch itself. Since the clemency power is vested in the absolute discretion of the executive, judicial review is contrary to this Court's decision in *Dumschat*. Because the clemency power is not a "constituent part of the justice system" it is not subject to judicial review under *Evitts v. Lucey*, 469 U.S. 387 (1985).

The Constitution does not entitle clemency claimants to control the circumstances under which their claims shall be heard. The unfettered discretion reposed in the state executive permits the executive to consider a claimants' declination of the opportunity to be interviewed by clemency authorities as a factor in reaching the clemency decision. The inherent power to give mercy as an official act in the interest of the public welfare also permits a negative inference to be drawn from a claimants' refusal to waive the Fifth Amendment privilege against self-incrimination. Clemency applicants are not entitled to immunities available to defendants facing trial. Even if the privilege against self incrimination applied, the

executive is not forbidden from considering its invocation as a reason to deny clemency.

ARGUMENT

I.
THE STATE EXECUTIVE CLEMENCY POWER IS NOT SUBJECT TO JUDICIAL REVIEW UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

This Court is considering whether a federal court may review the state executive clemency process under the Due Process Clause. This important question arrives at the intersection of our double-deckered Constitutional system of "dual sovereignty"; a multi-level system which divides power between federal and state governments and then subdivides the power between branches of those governments. *Printz v. United States*, __ U.S. __, 117 S. Ct. 2365, 2376 (1997).

This issue raises troubling concerns about the always sensitive area of judicial review of executive decisions. *Herrera v. Collins*, 506 U.S. 390, 421 (O'Connor, J. conc.); *cf. Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987). This Court has cautioned that the open-ended expansion of the Due Process Clause "invites undue interference with both considered legislative judgments and the careful balance that the Constitution strikes between liberty and order." *Medina v. California*, 505 U.S. 437, 443 (1992). Substantial deference is owed both to the states' expertise in matters of criminal procedure and to the centuries of common law tradition. *Id.*, at 445. The utmost care must be exercised in expanding the reach of the Due Process Clause, "lest [the Due Process Clause]

be transformed into the policy preferences" of the courts. *Washington v. Glucksberg*, __ U.S. __, 117 S. Ct. 2258, 2262 (1997).

It is especially imperative that this Court begin, as it always does in due process cases, with examining our history, traditions, and practices. *Washington*, 117 S. Ct. at 2262. A due process violation is established only when the state transgresses some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Herrera v. Collins*, 506 U.S. 390, 407-408 (1993). Given the well-settled traditions and practices of the clemency power, the burden of demonstrating a due process interest is especially heavy. *Schick v. Reed*, 419 U.S. 262, 266 (1974); *Ex parte Grossman*, 267 U.S. 87, 118-119 (1925).

Historical exposition is particularly appropriate in the context of state executive clemency. Both the President's power of clemency and the state executives' powers are traceable to the same roots. *Ex parte Wells*, 18 How. (59 U.S.) 307, 313 (1855); *Hoffa v. Saxbe*, 378 F. Supp. 1221, 1229 fn. 27 (D.C.Cir. 1974).[2]

Historical analysis supports this Court's conclusion in *Dumschat* that due process protections do not apply to executive clemency. The due process protections for first appeals represented by *Evitts* are not relevant since clemency is not a "constituent part" of the adjudication process and because the clemency power was entrusted to the province of the inherently meaningful and scrupulous consideration of the executive. Given the history and nature of the clemency power, judicial review

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2. Amici note, however, that the "powers held by the federal executive are not dispositive of the scope of authority inhering in a state governor...." *Carchedi v. Rhodes*, 560 F. Supp. 1010, 1014 (S.D.Oh. 1982). Hamilton actually argued that the New York governor had greater clemency powers than the President. Hamilton, Federalist No. 69 (Rossiter ed. 1961) at pp. 418-419.

under the Due Process Clause is both undesirable and paradoxical.

In *United States v. Wilson*, 7 Pet. (32 U.S.) 150, 160-161 (1833) Chief Justice Marshall explained:

> "As [the Pardon Power] has been exercised from time immemorial by the executive of that nation whose language is our language; and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

Since *Wilson*, this Court has reiterated that the meaning of the Pardon Power must be interpreted in reference to British law and institutions as they existed at the time the Constitution was drafted. *Grossman*, 267 U.S. at 108-109 (1925); *Wells*, 18 How (59 U.S.) at 310-311 (1856); *Solesbee v. Balckom*, 339 U.S.9, 12 (1950); *Schick*, 419 U.S. at 262; *Herrera*, 506 U.S. at 412.

A. The Royal Prerogative

"Historically, the power of pardon has been near to an absolute, if not absolute power of the executive, and thus vested with certain flexibility." Grupp, *Historical Aspects of the Pardon in England*, 7 Am. J. Leg. Hist. 51 (1963).

Both the power of clemency and any due process components are viewed through an historic lens that peers as far back as pre-Hastings Saxon England during which kings exercised a private, primitive "household power" of withholding or inflicting vengeance or retribution. Note, 39 N.Y.U.L. Rev. 137, 139 & fn. 10 (1964). After the Conquest of England, the Normans endeavored to

maintain that the clemency power was the "exclusive prerogative of the sovereign." However, a succession of English kings struggled with the nobility and the Church for possession of the pardon power. Parliament legislated restrictions on that power until Henry VIII secured a statute vesting the king with "the whole and sole power and authority" to pardon in 1535. *Id.* at 140 & fn. 14.

During the early 1700's, the pardon power was the special prerogative of the Crown subject to limited Parliamentary restrictions. 39 N.Y.U.L. Rev. at 140; *Grupp*, at 56-58. As this Court noted in *Herrera*, Blackstone praised the power of the sovereign "to extend mercy, whenever he thinks it is deserved; holding a court of equity in his own breast, to soften the rigueur of the general law, in such criminal cases as merit an exemption from punishment." *Herrera*, 506 U.S. at 412 quoting 4 W. Blackstone, Commentaries 397.[3] Lord Edward Coke described the royal pardon as a "work of mercy.... It is frequently conditional, as he may extend his mercy upon what terms he pleases...." *Wells*, 59 U.S. at 311.

The clemency power in Colonial America was also vested initially and exclusively in the various colonies' chief executives with some restrictions. Prior to the Constitutional Convention, the states diluted the power of

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3. The absolute power of the sovereign was recognized in theatrical and literary comment. Portia's famous soliloquy about the "quality of mercy" included the pronouncement that mercy "is enthroned in the hearts of kings, It is an attribute to God Himself." Shakespeare, *Merchant of Venice*, Act IV (1597). Similarly, the lawyer and melodramist, Pietro Metastasio, wrote, "Mercy belongs to Gods and Kings alone." Metastasio, *La Clemenza di Tito, III* (1735). Francis Bacon wrote, "[I]t is a prince's part to pardon." Francis Bacon: *Essays, IV* (1597). Whichcote generalized, "In all supremacy of power there is inherent a prerogative to pardon." Benjamin Whichcote: *Moral and Religious Aphorisms* (1753). Perhaps the best description of the distinction between judicial and executive powers is Dryden's, "Reason to rule, but mercy to forgive. The first is law, the last prerogative." John Dryden, *The Hind and the Panther* 1.261 (1687).

their governors by spreading the power into the legislature. 39 N.Y.U.L. Rev. at 141; *Herrera*, 506 U.S. at 414.

B. Constitutional Clemency

Nonetheless, when the Constitutional Convention convened in 1787, the delegates viewed the pardon power as being within the domain of the executive with some legislative, not judicial, restrictions. *Schick*, 419 U.S. at 262. It was agreed at that time that the English king "may extend his mercy on what terms he pleases...." *Id.*, at 261 quoting 2 W. Hawkins, *Pleas of the Crown* 557 (6th ed. 1787). "It was implicitly understood that unless specifically limited [by Parliament], the King's power was plenary and without restriction." *Hoffa*, 378 F. Supp. at 1227, 1230. The pardoning power "at base [was] inherently unfettered except by the integrity of the repository of the power." *Id.* at 1229; see also *Schick*, 419 U.S. at 262. ("[B]y 1787 the English prerogative to pardon was unfettered except for a few specifically enumerated limitations.")[4]

The Federalist papers are a source this Court usually regards as indicative of the original understanding of the Constitution. *Printz*, 117 S. Ct. at 2372. Hamilton's Federalist No. 74, in particular, has been cited for its explanation of the scope of the Pardoning Power. *Schick*, 419 U.S. at 266 fn. 6; *Herrera*, 506 U.S. at 413-414.

Hamilton's essay expresses the two key attributes of the pardoning power envisioned by the framers: exclusivity and flexibility. The drafters believed that vesting the pardoning power solely in the executive

4. The Framers understood clemency as a "prerogative". *Schick*, 419 U.S. at 263. A "prerogative" was a right or capacity enjoyed by the king alone, a discretionary power uncontrolled by any other. *Aetna Cas. & Surety Co. v. Bramwell*, 12 F.2d 307, 309 (D.Ore. 1926) citing *Blackstone's Commentaries*, vol. 1, p. 239 (Ed. 1766).

offered the best assurance that this heavy responsibility would be exercised in a conscientious and meaningful manner. Hamilton noted that there was no disagreement as to the "expediency of vesting the power of pardoning in the President" except insofar as it related to treason. Federalist No. 74, at 448. However, given the diverse contingencies confronting the executive, Hamilton explained that it was necessary for the executive alone to have maximum unfettered discretion in exercising that power.[5]

Hamilton expounded as follows:

> "As the sense of responsibility is always strongest in proportion as it is undivided, it may be inferred that a single man would be most ready to attend to the force of those motives which might plead for a mitigation of the rigor of the law, and least apt to yield to considerations which were calculated to shelter a fit object of its vengeance. The reflection that the fate of a fellow-creature depended on his *sole fiat* would naturally inspire scrupulousness and caution; the dread of being accused of weakness or connivance would beget equal circumspection, though of a different kind. On the other hand, as men generally derive confidence from their numbers, they might often encourage each other to an act of obduracy, and might be less sensible to the apprehension of suspicion or censure for an injudicious or affected clemency. On these

5. The adoption of the Due Process Clause of the Fifth Amendment in the Bill of Rights would not alter that analysis. The first eight amendments of the Bill of Rights were designed to incorporate the certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country. *Brown v. Walker*, 161 U.S. 591, 600 (1896). The English clemency power was one of those certain principles of natural justice.

> accounts, one man appears to be a more eligible dispenser of the mercy of the government than a body of men.... It is not to be doubted that a single man of prudence and good sense is better fitted, in delicate conjunctures, to balance the motives which may plead for and against the remission of the punishment than any numerous body whatever." Federalist No. 74 at 447-448.[6]

The Federalist also explained the value of discretion in the exercise of clemency:

> "Humanity and good policy conspire to dictate that the benign prerogative of pardoning should be as little as possible fettered or embarrassed.... But the principal reason for reposing the power of the Chief Magistrate is this: in seasons of insurrection or rebellion, there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquillity of the commonwealth; and which, if suffer to pass unimproved, it may never be possible afterwards to recall. The dilatory process of convening the legislature, or one of its branches, for the purpose of obtaining its sanction to the measure, would frequently be the occasion of letting slip the golden opportunity.

6. Experience confirms Hamilton's opinion on exclusivity. Kobil, *Due Process in Death Penalty Commutations: Life, Liberty, and the Pursuit of Clemency*, 27 U. Rich. L. Rev. 201, 221 (1993) ("I believe that traditionally capital clemency requests have been given meaningful consideration by decisionmakers."); M. Disalle, *The Power of Life or Death* 175-176 (1965) ("I have never known a governor so blase or so heartlessly devoted to the rule of eye for an eye that he did not go into a long executive session with his conscience when faced with a decision involving clemency.") Brown, *The Quality of Mercy*, 40 U.C.L.A. L. Rev. 327, 328 (1992).

> The loss of a week, a day, an hour may sometimes be fatal." Federalist No. 74 at 448

Significantly, Hamilton and other supporters of the broad pardoning power emphasized that the purpose of the pardon was not just to remedy unreliable verdicts. In their view, the power was necessary to mitigate harsh sentences, reward rehabilitation, restore tranquility, preserve the government against insurrection, or immunize accomplices who testified against their fellow offenders. These purposes required flexibility so that the clemency power could be effectively utilized without being delayed or encumbered by proceduralism. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 Tex. L.R. 569, 591-592 (1991). Even today, these reasons for clemency retain their vitality. 42 Fed. Reg. 4391, 3 CFR 1977 Compl. at 4 (post-Vietnam amnesty for violators of Selective Service Law); *Murphy v. Ford*, 390 F. Supp. 1372, 1375 (W.D. Mich. 1975) (pardon of former President Nixon in interest of national tranquility).

Ultimately, the President was vested with the "power to grant Reprieves and Pardons of Offenses against the United States, except in Cases of Impeachment." U.S. Const., Art. II, sec. 2, cl. 1.[7] The power was vested completely in the President and the scope of the power was intended to be identical with that of the English Crown. *Grossman*, 267 U.S. at 113. The Framers rejected the portion of the English pardon power that resided in Parliament. *Schick*, 419 U.S. at 263; *Hoffa*, 378 F. Supp. at 1231. This Court characterized the pardon power as "unlimited" and independent of the other branches. *Ex parte Garland*, 4 Wall. (71 U.S.) 333, 380 (1866); *United States v. Klein*, 13 Wall. (80 U.S.) 128, 147

7. The "impeachment" prohibition tracked a similar restriction on the English monarch. *Schick*, 419 U.S. at 262.

(1871). The President was not required to seek or to rely upon any advice. *Hoffa*, 378 F. Supp. at 1244. The power to pardon flowed from the Constitution alone and "its limitations, if any, must be found in the Constitution itself." *Schick*, 419 U.S. at 267 (emphasis added).[8]

C. Separation of Powers

The clemency power had its origins as "something above and beyond the normal workings and restrictions and limitations of the criminal justice system...." *Hoffa*, 378 F. Supp. at 1229. The Federalist specifically distinguished the pardoning power from the judicial power:

> "The criminal code of every country partakes so much of necessary severity that without any easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." Federalist No. 74, at 447.

In *Wilson*, Chief Justice Marshall illustrated the difference between the executive power and the judicial power:

> "A pardon is an act of grace.... It is the private, though official act of the executive magistrate.... It is a constituent part of the judicial system, that the judge sees only with judicial eyes, and knows nothing respecting any particular case, of which he is not informed judicially. A private deed, not communicated to him, what may be its character, whether a pardon or release, is totally unknown and cannot be acted on."[9] *Wilson*, 32 U.S. at 160-161. See also *Herrera*, 506 U.S. at 413.

Since *Wilson*, pardon and commutation decisions have not traditionally been the business of courts; "as such they are rarely, if ever, appropriate subjects of judicial review." *Dumschat*, 452 U.S. at 464; *Solesbee*, 339 U.S. at 12; *Rosenberg v. United States*, 346 U.S. 322 (1953) (Frankfurter, J. conc.); *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 421 (2nd Cir. 1950) (L.Hand, J.); *United States v. Soeder*, 120 F. Supp. 594, 595-596 (N.D. Ill. 1954).

Grossman illustrates the full extent and reach of the clemency power. The President commuted the jail sentence of a contemnor. This Court rejected the argument that the commutation violated the separation of powers. Chief Justice Taft's majority opinion rejected this argument and held the President's power absolute, even to pardon defendants found to be in contempt of the judicial branch.

> "Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.

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8. Besides the limitations inherent within the historic definition of a pardon and reprieve, (*Biddle v. Perovich*, 274 U.S. 480, 487 (1927)) these limitations included that the pardon power only extend to federal crimes and not to cases of impeachment.

9. Commentators frequently misconstrue this passage and take it out of context to assert that Marshall described the Pardon Power as a "constituent part of the judicial system." Kobil, 69 Tex. L.R. at 611; Klassmeier, *Towards a New Understanding of Capital Clemency and Procedural Due Process*, 75 B.U.L. Rev. 1507, 1515 (1995); Note, 90 Yale L.J. 889, 896 & fn. 30 (1981); Note, 70 Chi.-Kent L. Rev. 1391, 1407 (1995); Note, 73 Neb. L. Rev. 483, 486 (1994). Marshall was stating just the opposite. He explained that a pardon is an act of the executive that occurs totally outside the judicial branch. The judiciary is not even aware of the pardon unless it is officially brought to the court's attention in court. *Woodard's* use of *Evitts v. Lucey* to describe clemency as an "integral part" of the adjudication process is completely contradicted by *Wilson*.

> The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.... [W]hoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the [President] in confidence that he will not abuse it." *Grossman*, 267 U.S. at 120-122.

Grossman teaches that the executive clemency power is more than just a corrective for the harsh and cruel results of the adjudication process. It is also a check on the abuses of the judicial branch itself. It would be a "curious logic" that imposed a level of judicial review on a system that was itself designed as a check on the judiciary. *Schick*, 419 U.S. at 267.

Woodard's claim of due process protections in the clemency process must be viewed against an historic backdrop. Unlike the appeal of right at issue in *Evitts v. Lucey*, 469 U.S. 387 (1985), executive clemency is not a "constituent part of the judicial system." Furthermore, under our constitutional system, the vesting of that power in the executive in and of itself ensures meaningful and conscientious consideration of all cases. As *Grossman* indicates, the States reposed this power in the executive with the presumption that the power will not be abused. The intrusion of judicial review would hamper the flexibility in discretion which the Framers intended.

D. Contemporary Clemency

Clemency remains an ad hoc power which may be exercised at any time for any reason. From the standpoint of the claimant, it is a possibility, not an entitlement or expectation. *Solem v. Helm*, 463 U.S. 277, 301, 303 (1983). Under any due process analysis, it does not create an entitlement or expectation. *Dumschat*, 452 U.S. at 467; *Sandin v. Conner*, __ U.S. __, 115 S.Ct. 2293, 2299 (1995). The executive has a "plenary" authority. *Schick*, 419 U.S. at 266.

This Court rejected any due process claims arising from the Fourteenth Amendment when it held in Dumschat that "[t]he ground for a constitutional claim, **if any**, must be found in statutes or other rules defining the obligations of the authority charged with exercising clemency." *Dumschat*, 452 U.S. at 465 (emphasis added). As this Court noted in *Dumschat* and in the line of cases leading to *Sandin*, the absolute discretion imposed in the decisionmaker negates any constitutional claims under the Due Process Clause. *Sandin*, 115 S. Ct. at 2299.

Although the Constitution did not require the States to offer clemency, the States have provided for this extrajudicial remedy along the lines of the constitutional model. *Herrera*, 506 U.S. at 414. Virtually all of the States have vested their executives with either the exclusive or pivotal role in the clemency process.[10/]

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10. Virtually all states have chosen to vest the governor with the sole or decisive power of clemency. The States have also given the governor unfettered discretion, although many states do restrict the governor's clemency power in cases of treason or impeachment. Alabama (Ala. Const., art. V, § 124); Alaska (Alk. Const., art. III, § 21); Arizona (Ariz. Const., art. V, § 5); Arkansas (Ark. Const. 6, § 18); California (Cal. Const., art. V, § 8); Colorado (Colo. Const., art. IV, § 7); Delaware (Del. Const., art. VII, § 1); Florida (Fla. Const., art. IV, § 8); Hawaii (Haw. Const., art. V, § 5); Illinois (Ill. Const. art. V, § 12); Indiana (Ind. Const. art. 5, § 17); Iowa (Io. Const., art. IV, § 16); Kansas (Kan. Gen. Stat. § 22-3701); Kentucky (Ky. Const., § 77); Louisiana (La. Const. art., IV, §

Given the traditionally discretionary nature of the clemency power, the States have not been compelled to choose any particular procedural mechanisms. As a result, there is great variety in procedures among the States. 39 N.Y.U.L. Rev. at 141; National Governor's Ass'n, Guide to Executive Clemency Among the American States (1988); Nat'l Center for State Courts Clemency: Legal Authority, Procedure, and Structure (1977). Furthermore, procedures change as gubernatorial administrations change. 39 N.Y.U.L., at 146; 40 U.C.L.A.L Rev. at 337.

Since the clemency power does not "see[] only with judicial eyes" and is not a "constituent part of the justice system," it has operated along the classic design articulated by Justice Cardozo in *Andrews v. Gardiner*, 121 N.E. 341, 343 (N.Y. App. 1919):

> "Such an application [for clemency] is not a proceeding in court, nor one before an officer

5); Maine (Me. Const., art. V, § 11); Maryland (Md. Const., art. II, § 41, § 4-513); Massachusetts (Mass. Const., Pt. 2nd, Ch. II, § I, art. VIII); Michigan (Mich. Const., art. V, § 14); Minnesota (Minn. Stats., ch. 638, § 638.01); Mississippi (Miss. Const., art. 5, § 124) Missouri (Mo. Const., art. IV, § 7); Montana (Mont. Const., art. VI, § 12); New Hampshire (N.H. Const., Pt. 2nd, art. 52); New Jersey (N.J. Const., art. V, §II:1); New Mexico (N.M. Const., art. V, § 6); New York (N.Y. Const., art. IV, § 4); North Carolina (N.C. Const., art. 3, § 5); North Dakota (N.D. Const., art. V, § 7); Ohio (Oh. Const., art. III, § 11); Oklahoma (Okla. Const., art. VI, § 10); Oregon (Ore. Const., art. V, § 14); Pennsylvania (Pa. Const., art. IV, § 9); Rhode Island (R.I. Const. , art. IX, § 13); South Carolina (S.C. Gen. Stats., § 24-21-910); South Dakota (S.D. Const., art. IV, § 3); Tennessee (Tenn. Code, tit. 40, ch. 27, § 40-27-101); Texas (Tex. Const., art. IV, § 11); Vermont (Vt. Const., Ch. II, § 20); Virginia (Va. Const., art. V, § 12); Washington (Wash. Const., art. III, § 11); West Virginia (W.V. Const., art. VII, § 11); Wisconsin (Wis. Const., art. V, § 6); Wyoming (Wyo. Const., art. 4, § 5).

Other states have vested the clemency powers in executive boards in which the governor's action is not decisive. Connecticut (Conn. Gen. Stat. § 18-26); Georgia (Geo. Const. art.IV, § II); Idaho (Id. Const. art. IV, § 7); Nebraska (Neb. Const. art. IV, § 13); South Carolina (S.C. Gen. Stat. § 24-21-920) (non-capital cases); Utah (Ut. Const. art. VII, § 12).

> having "attributes similar" to a court's. [Citation omitted.] It is a petition for mere grace and mercy.... It grows out of the action of the courts, but it seeks to reverse their action by an appeal to motives and arguments which not those of jurisprudence. There are no clearly defined issues. There is often a most informal hearing. Sometimes there are arguments of counsel... At such a time anything is pertinent that may move the mind to doubt or the heart to charity. It is not necessary that reason be convinced; it is enough that compassion be stirred."

In addition, due to the sensitive nature of the investigations, discovery in clemency proceedings is limited. It is not customary for the claimant to be present for a clemency session. There are usually no prescribed rules of procedure and rules of evidence are not usually applicable. There is no requirement for any statement of reasons for a clemency decision. *Dumschat*, 452 U.S. at 466; *Otey v. Stenberg*, 34 F.3d 635, 637 (8th Cir. 1994); 39 N.Y.U.L. Rev. at 152-158.

There is no more reason today to hold that the Due Process Clause compels judicial review of the state clemency power than there was in 1787. Historically the clemency power was conceived as part of a system that did not require state appellate or collateral review, much less the current federal habeas corpus review. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 285-295 (Thomas, J., plur.), 297-303 (O'Connor, J. conc.) (tracing historical development of federal review); *McKane v. Dunston*, 153 U.S. 684 (1894); *Coleman v. Thompson*, 501 U.S. 722, 752 (1991).[11] For that matter, due process standards did not

11. Until *Woodard*, both federal and state courts have had the restraint repeatedly to hold that clemency decisions are not judicial functions and that the executive has unlimited discretion. It is exclusively executive and not

apply to the death penalty. *McGautha v. California*, 402 U.S. 183 (1971). The executive cannot be expected to provide greater due process protection than required of the judicial branch.

If anything, the development of parole and the increased judicial scrutiny of criminal convictions by the state and federal courts militates against procedural restrictions on the clemency power. As this Court noted when it essentially restored the death penalty in *Gregg v.*

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reviewable by the judiciary, even under the Due Process Clause. *United States v. Patti*, 291 F.2d 745, 746 (3rd Cir. 1961); *Spinkellink v. Wainwright*, 578 F.2d 582, (5th Cir. 1978); *Wainwright v. Brownlee*, 103 F.3d 708, 709 (8th Cir. 1997); *Peck v. Battey*, 721 F.2d 1157, 1159 (8th Cir. 1983); *Binion v. United States Department of Justice*, 695 F.2d 1189, 1190 (9th Cir. 1983); *Green v. Teets*, 244 F.2d 401, 403 (9th Cir. 1957); *Hatch v. State of Oklahoma*, 92 F.3d 1072, 1076 (10th Cir. 1996); *Bundy v. Dugger*, 850 F.2d 1402, 1423-1424 (11th Cir. 1988); *Banks v. Arizona State Board of Pardons & Paroles*, 629 P.2d 1035, 1037-1038 (Ariz. App. 1981); *Arnold v. Board of Pardons & Paroles*, 805 P.2d 388, 391 (Ariz. App. 1990); *Jenkins v. Knight*, 293 P.2d 6, (Cal. 1956); *People v. Herrera*, 516 P.2d 626, 629 and cases cited therein (Colo. 1973); *People v. Bradney*, 652 N.E.2d 428, 431 (Ill. App. 1995); *People ex rel. Symonds v. Gualano*, 260 N.E.2d 284, 290 (Ill. App. 1970); *Colvin v. Bowen*, 399 N.E.2d 835, 838-840 (Ind. App. 1980); *State v. Jones*, 639 S.2d 1144, 1150 (La. 1994); *Whittington v. Stevens*, 73 S.2d 137, 139-140 (Miss. 1954); *State v. Hunter*, 477 A.2d 797, 802-803 (Me. 1982); *Whitaker v. State*, 451 S.W.2d 11, 15 (Mo. 1970); *State v. Robinson*, 356 A.2d 449, 455 (N.J. 1976); *Holder v. State*, 488 P.2d 600, 602 (Okla. App. 1971); *Eacret v. Holmes*, 333 P.2d 741, 744 (Ore. 1958) and cases cited therein; *Hennessey v. Pennsylvania Board of Pardons*, 655 A.2d 218, 220 & fn.2 (Pa. 1995); *State ex rel. Maurer v. Sheward*, 644 N.E.2d 369, 373 (Ohio 1994); *State v. Oban*, 372 N.W. 2d 125, 128 (S.D. 1985); *Collins v. State*, 550 S.W.2d 643, 650 (Tenn. 1977); *R.R.E. v. Glenn*, 884 S.W.2d 189, 192 (Tex.App. 1994); *Doe v. Salmon*, 378 A.2d 512, 514-515 (Vt. 1977); *Kennedy v. State*, 595 P.2d 577, 578 (Wyo. 1979); *see also*, *Mallory v. State*, 435 P.2d 254, 255 (Id. 1967).

The pre-*Dumschat* case of *McGee v. Arizona State Board of Pardons and Paroles*, 376 P.2d 779 (1962) is oft-cited as the lone case which did find due process protections in the state clemency process. However, *McGee's* "reasoning" is "strained." 39 N.Y.U.L. Rev. at 179. Subsequent Arizona court decisions hold that *McGee* is not based on any federal constitutional rationale. *Banks*, 629 P.2d at 1038.

Georgia, 428 U.S. 153, 199-200, fn. 50 (1976), restrictions on the clemency process would be alien to our sense of criminal justice. In *Herrera*, this Court noted that the clemency power as it is presently functioning had resulted in the pardon of wrongly-convicted defendants. *Herrera*, 506 U.S. at 415.

Moreover, this Court has held that due process protections do not apply to the discretionary and collateral levels of judicial review which now ordinarily intervene between the trial and clemency process. *See, e.g., Coleman*, 501 U.S. at 752; *Ross v. Moffitt*, 417 U.S. 600 (1974). This Court has never accepted the premise that when a State "chooses to offer help to those seeking relief from convictions, the Federal Constitution dictates the exact form such assistance must assume." *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987). As a result, federal courts decline to review such state processes. *See, e.g., Franzen v. Brinkman*, 877 F.2d 26 (9th Cir. 1989). Executive power should be treated no differently.

Judicial review is not a positive prospect for the clemency process. This Court has noted the problems with micromanagement of the states correctional system. *Sandin*, 115 S. Ct. at 2299-2300. Litigation such as the civil rights suit in this case will potentially hinder the information and deliberative process. *See, e.g., Binion*, 695 F.2d at 1191. Given the variety of procedures, the court will surely embark on the kind of case-by-case, state-by-state scrutiny of clemency procedures that the judicial system abhors. *Sandin*, S. Ct. at 2299-2300.

To agree with *Woodard*, this Court would "reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State." *Washington*, 117 S. Ct. at 2269. Although *Woodard* purports to minimize the potential due process protections, it cannot escape Justice Cardozo's warning that every principle has a tendency to expand itself to the limits of its logic. Without complete rejection of *Woodard*,

the states will descend a slippery slope of expanded litigation into this area. *Id.*, at 2274 & fn. 23.

Indeed, the slippage has already begun. Since the granting of certiorari in this case, the Sixth, Eighth, and Ninth Circuits have considered last-minute challenges to state clemency procedures in capital cases. In *Woratzeck*, the Ninth Circuit relied on *Woodard* to hold that clemency procedures violate due process if the procedures "shock the conscience." *Woratzeck*, 117 F.3d at 404. In the decision of *In re Sapp*, the Sixth Circuit overturned a stay of execution in a civil rights suit challenging Kentucky's totally discretionary clemency system. However, *Sapp* leaves open a challenge to any clemency system that has instituted specific clemency procedures even though those procedures do not affect the governor's unfettered discretion. No court has ever held any rights are created by the establishment of procedures to rationalize or regularize the process by which a discretionary decision is made. *See, e.g., Sandin*, 116 S. Ct. at 2299; *Dumschat*, 452 U.S. at 466-467; *Hoffa*, 378 F. Supp. at 1244. In *Perry*, the Eighth Circuit also overturned a last-minute stay of execution issued by a district court in reliance on *Woodard*.

Thus, the courts have already slid into an analysis that incorrectly "shifts the focus of the liberty interest inquiry to one based on the language of a particular regulation, and not the nature of the deprivation...." *Sandin*, 115 S. Ct. at 2299. The courts are ignoring *Dumschat's* admonition that an "underlying right must come into existence before it can trigger due process protection." *Dumschat*, 452 U.S. at 458. The court will now conduct microscopic searches for heretofore unseen and unknown, conscience shocking due process violations. This is "hardly... federalism at its best." *Otey*, 34 F.3d at 638.

A state which offers executive clemency has more than fulfilled any due process requirement.

Additional proceduralism requires subtle balancing of societal interests by the legislative branch, not the judicial. *Medina*, 505 U.S. at 453. As history shows, the clemency power has been peculiarly subject only to legislative constraints. The states have concluded that society's interests are best served by a judicial system of review and a separate unencumbered executive system of review. It is a power that requires discriminating choices and individualized judgment. *Schick*, 419 U.S. at 256, 268. "The very essence of the pardoning power is to treat each case individually." *Ibid.* Any restriction on that flexibility would inhibit the frequency of its existence. *Id.* at 267.

Amici submit that there is no fundamental principle of justice so rooted in the traditions and conscience of our people to require judicial review of executive clemency procedures under the Due Process Clause.[12]

II.
THE PRIVILEGE AGAINST SELF-INCRIMINATION DOES NOT EXTEND TO VOLUNTARY INMATE INTERVIEWS FOR STATE EXECUTIVE CLEMENCY PROCEEDINGS

This Court has also granted certiorari on a question of whether clemency applicants may be required to waive the privilege against self-incrimination as part of a voluntary clemency interview. There is no support for

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12. Similarly, this Court consistently refuses to interfere in the exercise of the state reprieve power. *See, e.g., Storti v. Massachusetts*, 183 U.S. 138, 142 (1901); *Lambert v. Barrett*, 159 U.S. 660, 662-663 (1895); *Rogers v. Peck*, 199 U.S. 425, 434-435 (1905).

the position that clemency claimants are entitled to protection against self-incrimination when they voluntarily agree to a clemency interview.

This question tests this Court's repeated assurances that clemency is an ad hoc exercise of state executive power and that a governor "may commute a sentence at any time for any reason without reference to any standards." *Solem*, 463 U.S. at 301. A state executive is not required to act "on prescribed grounds." *Dumschat*, 452 U.S. at 467. In our constitutional system, the federal pardon power is an official act of grace based on the "public welfare." *Biddle*, 274 U.S. at 486.

Clemency review requires collection of information, including information from the applicant. A clemency applicant has an incentive to offer complete and truthful information in order to impress the decisionmaker. The executive has no interest, however, in allowing the clemency interview to be engulfed by an "immunity bath" for the applicant or any potential accomplices. An applicant's refusal to talk may be just as "informative" to the executive in determining clemency as an interview.

Woodard holds that it is unconstitutional to condition a clemency claimant's unilateral hope for clemency on an agreement to waive the privilege against self-incrimination for a voluntary interview by state clemency authorities. Amici submit that *Woodard* is wrong. The Constitution does not forbid a state executive from considering the applicant's refusal to waive the privilege against self-incrimination in making a clemency decision. As a matter of "public welfare", a state executive may legitimately and constitutionally decide to deny clemency for an applicant who is unwilling to waive the Fifth Amendment privilege.

The clemency process vests absolute discretion in the executive. While clemency is usually considered after when there is little or no prospect of judicial relief

and the only remedy is the discretionary mercy of the executive, the point at which the application is considered is not dispositive. It is the autonomy of the executive which separates clemency from judicial proceedings. Whenever the application is considered, it would be a "curious logic" to permit the supplicant to dictate the conditions under which the supplication will be heard. *Schick,* 419 U.S. at 267; compare *Biddle,* 274 U.S. at 480 (a claimant "on no sound principle ought to have any voice in what the law should do for the welfare of the whole.").

Silence or an unwillingness to talk without immunity is very persuasive evidence itself. *Baxter v. Palmigiano,* 425 U.S. at 319. A governor "cannot be faulted for drawing a negative inference from petitioner's noncooperation." *Roberts v. United States*, 445 U.S. 552, 562 (1980) (Brennan, J. conc.). Silence supports a rational conclusion that the claimant lacks the "laudable attitude[]" or "willingness to shape up and change his behavior...." *Id.* at 557 (maj. opn. of Powell, J.). In this context, there is nothing "insolubly ambiguous" about his silence. *Id.* at 561. It is not unconstitutional to withhold leniency from "those who have not demonstrated those attributes on which leniency is based." *Corbitt v. New Jersey,* 439 U.S. 212, 223 (1979); *McMorrow v. Little,* 109 F.3d 432, 436 (8th Cir. 1997). The absence of information from the claimant "provides no weight on the scale in favor of" clemency. *Quegan v. Massachusetts Parole Board,* 673 N.E.2d 42, 44 (Mass. 1996).

The Constitution does not prevent the executive from drawing a negative inference from a claimant's silence. A clemency process is not a criminal trial. *Baxter,* 425 U.S. at 319. It is a wide-ranging informational process in which the claimant's guilt is rarely an issue. The executive has broad discretionary power which permits the denial of clemency for any reason. Since the State has no burden, the purpose of the privilege against self-

incrimination of putting the People to their proof is not implicated. *Rogers v. Richmond,* 365 U.S. 534, 541 (1961). If anything, as *Woodard* points out, the burden is on the claimant.

Thus, the State is not obligated to immunize clemency claimants for the purpose of being interviewed. The executive may consider the claimant's refusal to give unimmunized information in disposing of the clemency request. The very act of refusal by an applicant for mercy provides significant information to the executive. Under these circumstances, a claimant who volunteers for an interview should be no different from any other defendant who chooses to testify at trial--the claimant may be questioned fully about all pertinent matters. *McGautha v. California*, 402 U.S. 183, 215 (1971) disapproved on other grounds in *Gregg,* 428 U.S. at 195.

Even if the doctrine of "unconstitutional conditions" was applicable in this arena, a claimant would still not be protected from choosing whether or not to waive the privilege. The issue of "unconstitutional conditions" relating to waiving the privilege against self-incrimination is hardly uncharted territory. Yet, *Woodard* is more notable for the cases it ignores and the available analyses it spurns as it jumps to its conclusion that the Ohio clemency interview could impose an unconstitutional condition.

The general rule is that the privilege must be claimed when self-incrimination is threatened or the privilege is waived. However, that general rule does not apply when "the assertion of the privilege is penalized so as to 'foreclos[e] a free choice to remain silent, and... compel[l]... incriminating testimony.' Case law forbids the States from imposing "substantial penalties" because a person exercises the privilege against self-incrimination. *Minnesota v. Murphy*, 465 U.S. 420, 434 (1984)

In contrast to *Woodard*, it is useful to compare the clemency interview with the probation interview

considered by this Court in *Minnesota v. Murphy.* In that case a probationer was subject to a condition to appear at his probation office and answer questions truthfully. The probationer argued that the condition impermissibly required him to choose between making incriminating statements and jeopardizing his probation status by remaining silent. This Court held that the mere compulsion to attend a meeting and answer questions truthfully did not constitute an impermissible penalty for the exercise of the privilege against self-incrimination absent any evidence that the probation condition required him not to claim the privilege. *Minnesota*, 465 U.S. at 439.

The clemency interview is even less compelling than the probation interview in *Minnesota v. Murphy*. The interview is completely voluntary. Although it should not matter, there is no indication in this case that the decision not to be interviewed will even affect the clemency decision. More decisively, unlike the probation situation in *Minnesota*, a clemency claimant is not faced with the possibility of losing any conditional liberty. The claimant is hoping to gain some sort of conditional liberty in the form of a pardon or commutation. Certainly if the probation condition in *Minnesota* did not constitute an unconstitutional condition, the clemency interview in *Woodard* could not be so construed.[13] This Court should not "equate the possibility of leniency with impermissible punishment." *United States v. Henry,* 883 F.2d 1010, 1011 (11th Cir. 1989).

In this case, the State is not imposing a "substantial penalty" when it simply denies clemency. "There is a crucial distinction between being deprived of

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13. *Woodard* suggests that evidence that "overwhelming majorities of the prisoners granted clemency were those who took advantage of the 'optional' interview" would establish a constitutionally cognizable benefit. *Woodard,* 107 F.3d at 1190. This Court rejected an analogous argument in *Dumschat.*

a liberty one has, as in parole, and being denied a conditional liberty that one desires." *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 9 (1979); *Dumschat,* 452 U.S. at 464. The denial of clemency only means that the claimant is being required to serve the sentence he received originally. *Quegan,* 673 N.E.2d at 44 and cases cited therein. *Woodard's* argument loses sight of the significant constitutional and "human difference between losing what one has and not getting what one wants." *Greenholtz,* at 10.

As petitioner already notes, *Woodard* also inexplicably omits mention of this Court's decision in *McGautha. McGautha* considered whether the unitary guilt-penalty trial in Ohio impermissibly conditioned the right to be heard on punishment on waiving the privilege against self-incrimination.[14] This Court explained:

> "Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose." *McGautha*, U.S. at 213; *see also, United States v. Nobles,* 422 U.S. 225, 240 (1975); *Bonin v. Calderon,* 59 F.3d 815, 839-840 (9th Cir. 1995) and cases cited therein.

McGautha limited an "unconstitutional condition" to choices between two rights or "benefits" guaranteed under the Bill of Rights. *McGautha*, 402 U.S. at 211-212 distinguishing *Simmons v. United States*, 390 U.S. 377 (1968). However, as the Eighth Circuit recently held in *Perry v. Brownlee*--no such choice is presented in a clemency situation since there is no constitutional right to

14. The question of the unitary trial was presented in *McGautha's* companion case, *Crampton v. Ohio.*

clemency review. As *Woodard* acknowledged, the clemency process ordinarily follows judicial litigation. See also 39 N.Y.U.L. Rev. at 152. At this point, a clemency claimant has frequently been through appellate and collateral review. At trial, the privilege against self-incrimination relates to the prosecution's burden of proof. However, on appeal and in habeas corpus, it is the claimant's burden to overcome a presumptively valid judgment.

In the context of habeas corpus an adverse inference may be drawn from a petitioner's silence. *Bean v. Calderon*, 166 F.R.D. 452, 455 (E.D.Cal. 1996). Frequently, claimants have provided or will provide information by verifying petitions for writ of habeas corpus and by testifying as to formerly privileged conversations with their lawyers. *Ibid.*; *Strickland v. Washington,* 466 U.S. 691 (1984); see also Rule 6, Rules Governing Section 2254 (allowing the deposition of a petitioner in habeas corpus); *Harrison v. State,* 456 S.W.2d 371, 373 (Tex. Crim. App. 1970). Therefore, compelling an "election" between waiving the privilege and declining the clemency interview does not "impair[] to an appreciable extent any of the policies" underlying the privilege. *McGautha*, 402 U.S. at 213.

The Constitution does not necessarily forbid choices that have the effect of discouraging the exercise of constitutional rights. *Jenkins v. Anderson,* 447 U.S. 231, 236 (1980). Since claimants have no right to a particular clemency decision, they cannot challenge the states' conditions for reaching that decision. The state is not required to immunize clemency applicants when granting those claimants an opportunity to present personally their plea for executive mercy. *McGautha*, 402 U.S. at 211-212 220.

CONCLUSION

For the foregoing reasons, as well as those set forth in the briefing on file, Amici Curiae request that the Sixth Circuit Court of Appeal be reversed.

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